

HCLU on Capital Punishment

There has been no capital punishment in the Hungarian legal system since 1990 but initiatives to have it re-introduced have occasionally been launched and the majority of Hungarian citizens approve of the idea of administering death as a penalty. HCLU subscribes to the opinion that a barbarous form of punishment such as the death penalty has no place in a state which respects human rights. Capital punishment violates the right to life and counts as a cruel and inhumane form of punishment. HCLU is therefore trying to introduce people to the international efforts that are being made toward the abolition of capital punishment and is striving to make the public realise that there are no acceptable reasons for re-introducing it. Capital punishment is not to be applied in a civilised state.

What Are the Major International Trends?

The understanding of law prevalent in democratic states – with the only exception of the United States – is unanimous in rejecting capital punishment and international trends in legal development also point toward the complete abolition of this form of punishment. This requirement is upheld most clearly in the European Union, and the human rights conventions adopted by the UN and the European Council aim at the abolition of capital punishment in times of peace. In light of international tendencies the abolition of capital punishment in a given state emerges as one of the standards by which its constitutional and democratic character will be judged.

RULES OF INTERNATIONAL LAW

A change in the international attitude to capital punishment occurred in the late 20th century despite the fact that international documents on human rights issued after world War II, rather than banning capital punishment altogether, rested content with enunciating the legal conditions under which it was to be administered. The Universal Declaration of Human Rights did not address the question, while the European Convention on Human Rights made it clearly possible for the member states of the European Council to apply capital punishment in the framework of an appropriate legal procedure. Article 2. states, among others, “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The International Covenant on Civil and Political Rights is the reflection of a compromise between UN member states for and against capital punishment: it allows, on the one hand, the imposition and execution of the death penalty as a sanction against the gravest crimes within the confines of a strict observance of a legal procedure, (Section 2, Article 6) while, on the other hand, it recommends the member states to abolish it (Section 6, Article 6).

A decisive change in the attitude to the death penalty in international law occurred in the 1980s. Recognising the general trend in member states toward the abolition of capital punishment, the Council of Europe adopted the Protocol No. 6 to the European Convention on Human Rights, which enunciates directives for the abolition of capital punishment. Following close behind this, in 1989, the second optional protocol added to the International Covenant on Civil and Political Rights, which also prescribes the abolition of capital punishment, was accepted by the UN General Assembly. Both documents allow member states to decide for themselves whether they wish to recognise its content as binding, and both also allow an exception to the prohibition of the death penalty in times of war. A categorical prohibition allowing no exceptions was enunciated by the Charter of Fundamental Rights accepted by the

European Union in December 2000, stating that no one shall ever be sentenced to death or executed.

THE RULES OF PARTICULAR STATES

Responding to international trends, many democratic states introduced new legislation to abolish the death penalty. In several states the prohibition of the death penalty was incorporated in the constitution. A case in point is Germany where Article 102 of the Constitution says "Capital punishment is not to be applied." The Charter of Fundamental Rights and Liberties in the Czech Republic says "the death penalty is not allowed." (Section (3), Article 6). The constitutions of a number of other countries including Austria, Holland, Croatia, Portugal, Romania, Slovakia and Slovenia contain equivalent provisions. Constitutional democracies in which the constitution was not amended have tended to introduce new legislation to abolish capital punishment. In a few states, e.g. the Republic of South Africa, Latvia, Ukraine and Albania, the death penalty was removed from valid law as a result of a Constitutional Court decision in the 1990s.

As a result of these developments the overwhelming majority of democratic states have by now abolished capital punishment for all criminal acts. A few countries (e.g. Albania, Cyprus, Latvia) have retained it for exceptional circumstances, e.g. grave criminal conduct in times of war. In addition, a few countries can be put down as *de facto* abolitionist in view of the fact that while their laws do not prohibit capital punishment, they have not actually executed a criminal for ten years (e.g. Turkey).

As far as states maintaining and applying the practice of the death penalty are concerned – mainly African, Asian and American countries – China, Iran and Saudi-Arabia have seen the greatest number of cases of actually executed death penalty. The United States remains the only democratic state in which the death penalty is part of the everyday practice of the administration of justice. The Federal Constitution prohibits "cruel and unusual punishments" but the prevailing interpretation of the Constitution does not judge death penalty as cruel under all circumstances, especially since the Constitution itself mentions "capital offenses" in a non-prohibitive context and criminal prosecution "threatening life" in four places. Although, in *Furman v. Georgia*, the Supreme Court declared unconstitutional the laws of two federal states on capital punishment in 1972, the same body stated, four years later in *Gregg v. Georgia* that capital punishment was not necessarily in violation of the Constitution: as long as legislators secured due process and equal treatment and as long as courts were allowed to impose it only on the gravest offenses, capital punishment could be applied. In the last few decades the Supreme Court has decided against executing of death penalty or at least for their postponement with an appeal to grave violations to the requirement of due process committed in the course of criminal procedure. Despite this, the practice of regular courts is not aimed at narrowing the scope of the application of capital punishment. Judges do not attribute great importance to statistical information to the effect that sentencing policies in a particular state are discriminative against African-American citizens: the burden is on the convict to show that s/he has been treated in a discriminatory manner in the course of the legal process. Under the prevailing interpretation of the law the Constitution does not ban the imposition of the death penalty on mentally disabled or juveniles offenders, and according to general judicial practice detaining a convict for as many as twenty years in the death row until he is executed does not count as cruel and unusual punishment. The Supreme Court has argued in several rulings that decisions concerning the death penalty are up to legislators and the electorate in the first place.

It must be remarked that European states find this conception of law which is so permissive toward capital punishment that they decline to extradite persons suspected of the gravest crimes if they are not given guarantees by the US authorities requesting extradition that the person concerned will not be sentenced to death.

Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty

“Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.”

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

“Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.”

Charter of Fundamental Rights of the European Union Section 2 Article 2.:

“No one shall be condemned to the death penalty, or executed.”

How Was Capital Punishment Abolished in Hungary?

The abolitionist movement in Hungary has a history of two hundred years, but it was not until the transition to constitutional democracy had been completed in 1989-90 that the death penalty was finally removed from the Hungarian system of penal law. Although the Hungarian Jacobins who were the first to represent the Enlightenment in Hungarian politics had given expression to an abolitionist stand, Bertalan Szemere is regarded as the first highly influential proponent of anti-abolitionist views, which he stated in *On Punishment and the Death Penalty in Particular*, a book which was published in 1841. Szemere objected to capital punishment from the principled standpoint of natural law (“life is inviolable and killing is sinful”) and in terms of practical considerations (“unnecessary, irredeemable”). His

views could not be put into practice because the penal law bill of 1843, which was inspired by the spirit of abolitionism, was rejected both by the members of the Upper House and by the Crown. After this episode penal norms in effect in Hungary always allowed for the imposition of the death penalty for the gravest offenses, a circumstance which was exploited for the purpose of mass retaliation by regimes following a series of unsuccessful political movements beginning with the War of Independence of 1848 and leading to the 1956 revolution of the recent past. These historical experiences had a decisive influence on the amendment of the Penal Code adopted by the Parliament in 1989, the most eventful year of the constitutional transformation, in order that the death penalty should never again be allowed to be used for crimes against the State, i.e. the so-called “political criminal offenses”. In the course of the drafting of the Constitution the idea of an exceptionless abolition of the death penalty was raised but the Parliament did not decide the question, and the new Constitution emerging from the process did not contain a provision on the prohibition of the death penalty. As political decision-makers had not undertaken the decisive step, in January 1990, the League of the Opponents of Capital Punishment filed a petition for abolition with the Constitutional Court which had just started its activity. In its resolution 23/1990. (X.31.) AB the Constitutional Court stated that capital punishment was unconstitutional and struck down forthwith all legal rules relating to it. According to Section (2) Article 8 the essential content of fundamental rights cannot be restricted by laws, whereas “provisions relating to the deprivation of life and human dignity by capital punishment (...) not only limit the fundamental right to life and human dignity but permit the complete and irredeemable destruction of life and human dignity and the right thereto.”

None of the Constitutional Justices defended the idea of capital punishment. The only one who voted with a “no” did so as an expression of his conviction that the question should have been decided by Parliament. Eight Justices agreed, even if for different reasons, that capital punishment had no place in the Hungarian constitutional system.

Can Capital Punishment Be Reinstated?

Within a few years after the Constitutional Court’s ruling Parliament ratified and promulgated both international human rights documents prescribing the abolition of capital punishment.

- in 1993 the Parliament ratified the European Convention on Human Rights together with the eight protocols. Thus the sixth protocol, which prohibits capital punishment, also became part of the national law. (Act XXXI./1993),
- in 1995 the Parliament promulgated, without stating any declaration of reservations, the Second Optional Protocol to the International Covenant on Civil and Political Rights, which enunciates the abolitionist standpoint on capital punishment (Act II./1995).

As against the ruling of the Constitutional Court and the international norms adopted by the Parliament, two cases of civil initiative have been launched for a national referendum on reinstating the death penalty, but matters never got as far as the collection of the signatures supporting the referendum because the National Election Committee declined to certify the sample copies of the signature list on the grounds that no national referendum can be held on “obligations resulting from international agreements and the content of the laws containing these obligations”. In its ruling 11/1999. (V.7.) the Constitutional Court declared the decision of the NEC to have been well founded and confirmed its decision that death penalty cannot be reinstated in Hungary through a referendum.

According to HCLU capital punishment could be reintroduced in Hungary only if Parliament decided by a two-thirds majority of votes to modify the Constitution, and if the Hungarian state unilaterally withdrew from its international obligations and thereby gave up its aspiration to accession to the European Union. This would mean that Hungary did not accept the principles which by now rose to an unquestioned status in the European understanding of law, and declared itself to stay outside of European legal culture.

Why Is Capital Punishment Impermissible?

HCLU shares the conviction of many that capital punishment violates human rights, and that it is not supported by considerations of efficacy.

IT VIOLATES THE RIGHT TO LIFE

The right to life, prohibiting the taking of anyone's life, is one of the most fundamental rights human beings. The injunction "Thou shalt not kill" imposes an obligation on the state and persons acting in their name just as much as on private persons. Therefore the state cannot have control over anyone's life and cannot deprive anyone of his/her life. HCLU holds that capital punishment is an arbitrary way of taking human life and that it therefore violates the right to life.

IT COUNTS AS CRUEL AND INHUMANE PUNISHMENT

All methods of the execution of the capital punishment qualify as cruel, inhumane, painful and degrading treatment. Hanging may result in very slow death by suffocation and it may also cause the head to break off the body. People executed in the electric chair experience excruciating pain: some parts of their body are burnt away, and the current often puts them to death after repeated applications of the shock. The gas chamber leads to death by suffocation and causes the condemned to suffer for several minutes before loss of consciousness sets in. The application of lethal injections often paralyses the condemned instead of causing him/her to die, leaving the person conscious, and the procedure has to be applied repeatedly. All methods of execution are preceded by a period of time spent in the death cell. The condemned person often has to spend the last months or years of his/her life there, waiting in terror for his/her last moments in life to roll by.

ITS APPLICATION IS DISCRIMINATORY

In states where there is capital punishment statistics clearly show that the practice of sentencing is discriminatory against the members of ethnic groups stricken by social prejudice and against the poor. *McCleskey v. Kemp* was the first case to confront the US Supreme Court with the fact that courts impose many more capital sentences on African-Americans who have killed white persons than on white persons who have killed African-Americans. Minority members do not necessarily commit more killings than do members of the majority of society, yet many more of them are sentenced to death. The disparity is even more striking when the victim is a white man. Besides, the death penalty is "a privilege of the poor". They cannot afford to pay for the services of highly qualified legal representatives, physicians and other experts. With a touch of irony we might say that those who are not big heads are more likely to lose their heads.

REVENGE IS UNACCEPTABLE

Capital punishment is a manifestation of the “an eye for an eye” principle, of *lex talionis*. HCLU holds that revenge cannot be the basis of punishment in a constitutional republic committed to the principle of the rule of law. No one would claim that rape has to be requited with rape, bodily harm with bodily harm, libel with libel. Punishment has to be proportional to the crime committed, but proportionality is not the same as administering the same harm on the offender s/he caused to someone else.

The fact that most citizens in Hungary still approve of capital punishment does not mean that politicians should strive to transform the constitutional order in order to quell the desire for revenge alive in public opinion. On the contrary, in an effort to change the public opinion, people should be introduced to the international experiences, the processes tending toward the abolition of capital punishment and efforts should be made to get a reasonable system of punishments widely accepted.

EVIDENCE DOES NOT SUPPORT THE CLAIM OF DETERRENCE

There is no reliable scientific evidence that capital punishment has a deterrent effect. In countries where capital punishment is still practised there are not fewer crimes committed in general and homicides in particular than in countries which have abolished the death penalty. Besides, the lifting of capital punishment has no significant influence on the number of crimes committed against life. Most cases of homicide are crimes of passion or are committed under the influence of alcohol, and the prospect of sanctions has no influence on the behaviour of the offender in these cases. Professional killers and all those who kill someone on a carefully considered plan may be influenced by the inevitability of punishment rather than by the kind of punishment.

Many people blame the rise in the number of murders in Hungary on the abolition of capital punishment. In fact, there were 201 cases of voluntary manslaughter in Hungary in 1990, while there were 308 such cases in 1991, 307 in 1992, and an average of 300 cases a year has since been steady. However, the rise in the number of killings is not linked to the abolition of capital punishment but much rather to the general rise in criminal activity which has been felt since 1989. Indeed, the number of crimes committed has risen much more significantly than the number of killings, by 300%. HCLU maintains that capital punishment is a wrong method of reducing criminality. Better results can be expected from effective persecution of crime and an administration of justice which functions at the adequate level and applies proportional punishments.

THE ERROR CANNOT BE REMEDIED

Capital punishment prevents only the murderer from committing further crimes. Experience shows however that in a few cases persons are executed who later are found innocent beyond any doubt. In the United States several hundreds of people were sentenced to death who later turned out to have been innocent and some of them were in fact executed, while most of them spent years, sometimes tens of years on the death row. The truth about cases of innocent people sentenced to death used to be revealed when the actual murderer confessed his deed. In recent years, DNA tests have shown about several persons who were once sentenced to death that they could not have been the actual murderer. (E.g. because probative evidence such as traces of substances found at the scene of the murder was shown to have derived from another

person.) All in all, error cannot be ruled out, and once the convicted person is executed, the consequences are beyond remedy.

What Punishment Should Be Inflicted on the Those Committing the Worst Offenses ?

HCLU holds that people who intentionally kill other people should be punished by long prison sentences possibly running to tens of years. Life sentence is also acceptable as long as the condemned is not completely deprived of the possibility of being released. If and only if a person who has committed a terrible crime shows no sign of a change of personality while in prison which would make a repetition of the crime unlikely, should s/he to stay in prison for all his/her life.

Modern, high-security prisons offer sufficient guarantee that the most dangerous convicts cannot escape. At the same time, it must also be seen that no man can be predicted with certainty to kill again. Tendency for violent behaviour alone does not necessarily mean that the person will commit further violent acts. HCLU holds that the feelings and interests of the relatives of victims must not be left out of consideration, either. They have to have rights to take part in the penal process and to contribute to the finding out of truth. Most importantly, however, the relatives of victims have to receive appropriate financial and emotional support, and civil associations are to undertake a major role in providing the arrangements necessary for meeting these needs.

To take stock: HCLU holds that the death penalty is a barbarous means of punishment which violates human rights, which is an impracticable and unsuitable way of preventing crime and requiting criminal acts. Therefore, HCLU supports the decision of the Constitutional Court on the abolishment of capital punishment and appreciates the fact that Parliament undertook an obligation in international law not to reintroduce it. We could not agree more with what one of the Constitutional Justices said: the galley and the guillotine only have a place in criminal museums next to the whipping bench.